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No. 82-2157

IN THE

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION AND

BRIEF OF *AMICUS CURIAE* ARTHUR YOUNG & COMPANY

IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

MAY AN EMPLOYER, WHICH PARTICIPATES IN A MULTIEMPLOYER BENEFIT PLAN, REFUSE TO MAKE AVAILABLE ITS EMPLOYEE RECORDS, INCLUDING RECORDS OF ITS PURPORTEDLY NON-COVERED EMPLOYEES, WHICH IT IS REQUIRED BY STATUTE TO KEEP TO DETERMINE EMPLOYEE BENEFIT PLAN ELIGIBILITY, TO THE AUDITORS OF THAT MULTIEMPLOYER BENEFIT PLAN?

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MOTION OF ARTHUR YOUNG & COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Arthur Young & Company ("Arthur Young") respectfully moves, pursuant to Rule 42 of the rules of this Court, for leave to file the annexed brief *amicus curiae*. Although the consent of counsel for the Petitioners has been obtained, the consent of counsel for the Respondents has been refused. This Court previously granted leave to Arthur Young to file a brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young

is the independent auditor of Petitioners, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund") and Central States, Southeast and Southwest Areas Health and Welfare Fund and also audits numerous employee benefit plans (several of which are multiemployer plans such as Petitioners). These audits permit the plan trustees to comply with the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 *et seq.*

Most employee benefit plans are required to file annual reports which include the plan's financial statements with the Department of Labor. The annual reports of plans with over 100 participants must include an independent accountant's opinion that the plan's financial statements have been audited in accordance with generally accepted auditing standards ("GAAS"). As is demonstrated in the brief *amicus curiae*, the ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants to audit multiemployer benefit plans in accordance with GAAS and thus materially impair the ability of the plan's trustees to comply with their fiduciary and statutory obligations.

Congress has required independent audits of the financial statements of employee benefit plans (*i.e.*, employee pension and employee welfare plans) to provide, *inter alia*, a level of assurance on the plan's financial statements. And although an independent audit also provides an important control on the administration of a plan,

> [t]he primary objective of a plan's financial statements is to provide financial information that is useful in assessing the plan's present and future ability to pay benefits when due.

FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 35 at ¶ 2 (1980).

In 1974 with the passage of ERISA Congress not only mandated an independent audit, but also required defined benefit

pension plans to have triennial actuarial valuations. Both the annual audit and triennial actuarial requirements are complementary: to assure that appropriate information is available so that plan participants and others (including regulatory authorities) can evaluate the ability of a plan to pay benefits when due.

When Congress enacted ERISA requiring that certain employee benefit funds be audited in accordance with GAAS, 29 U.S.C. §§ 1023, 1024, there existed a defined body of professional practice and literature detailing the procedures necessary to conduct a GAAS audit of multiemployer health and welfare benefit funds. These procedures included the testing of employer records. Congress knew that to conduct a GAAS audit the independent auditor would be required to test the adequacy of the funding of employee benefit plans according to the law and the terms of the plan. To accomplish this goal, the auditor, *inter alia*, performs tests to determine that the proper universe of plan participants has been identified, that contributions have been paid by the employer for each plan participant, and that participant benefit entitlements have been properly reflected in the actuarial calculations and related contributions received or receivable. GAAS thus requires not only the testing of the admittedly covered employees, but also testing for improper exclusion of covered employees from the contribution and benefit calculations; in other words, GAAS requires the ability to test the entire universe of employees.

Without the ability to determine the proper universe of plan participants it is impossible to determine if all required employer contributions have been made or if the actuarial valuation of a pension plan is correct. Since benefit eligibility in a multiemployer plan is determined by an individual's employment status, regardless of whether the employer has contributed to the plan, one may not be able to determine if a pension plan is underfunded[1] -- a major concern underlying the enactment of ERISA,

1. For example, if there were an annual under-reporting of only one half of one percent (.5%) of all participants currently estimated to be members of multiemployer pension plans (over 8,000,000 as of 1978) and the average employer contribution per participant to multiemployer plans were $50 a week (as it is in the National Master Freight Agreement at issue in the underlying proceeding), there would be an *annual*

29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Act of Sept. 26, 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 1208, and the creation of the Pension Benefit Guaranty Corporation, 29 U.S.C. §§ 1301-1309, in 1974.

Plan under-funding ultimately increases the burden on all employers, especially those who do not under-report their covered employees, since the resultant shortfall must be made up either by increased employer contributions to the fund from those remaining in the plan or by increased premium and/or withdrawal charges to employers by the Pension Benefit Guaranty Corporation ("PBGC"). Moreover, to the extent the existence of under-funding cannot be determined, payments imposed upon employers withdrawing from the plan cannot be properly calculated, contributing further to the financial uncertainty of multiemployer plans and increasing the ultimate burden on those who remain in the plan.

While recognizing a very limited right of access to employer data concerning purportedly non-covered employees, the opinion of the Sixth Circuit effectively precludes auditors from testing the universe of plan participants in most multiemployer plans. This restricted access to employer records creates a possible "scope" limitation on the audit. A significant "scope" limitation *ipso facto* results in a non-GAAS audit and would require the auditors to "qualify" or "disclaim" their opinion on employee benefit plan financial statements. The trustees would then fail to meet the statutory requirements for an audit of the plan financial statements in accordance with GAAS. Congress could not have mandated that plan trustees have a GAAS audit performed, knowing what such an audit entailed, and at the same time denied plan trustees the ability to fulfill that requirement.

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initial under-funding of contributions in excess of $100,000,000 (40,000 omitted participants x $2600) for all multiemployer plans. The compounded lost earnings from these unmade contributions is staggering.

In addition to preventing a GAAS audit, restricted access to employer data by both the plan's independent and internal auditors significantly reduces internal control over employer contributions legitimately due the plan and thus increases the likelihood of plan under-funding. Prohibiting the auditor from routinely testing whether purportedly non-covered employees are actually covered eliminates the significant deterrent value of these audit tests. This increases the likelihood that employers -- either through inadvertent oversight or possibly as a result of intentional under-reporting -- will fail to report and make required contributions for covered employees.

Thus *amicus curiae* Arthur Young has a direct interest in the outcome of this proceeding -- not only as it affects its ability to conduct its audits of the Central States Pension and Welfare Funds but also its ability to conduct audits of other multiemployer benefit plans. As a result of the Sixth Circuit opinion, one employer has already refused access of its employment records to Arthur Young in the course of its audit of The Central States Pension Fund and Arthur Young is concerned that other employers will do likewise.

WHEREFORE, Arthur Young respectfully moves this Court that leave be granted to it to file the annexed brief *amicus curiae*.

Dated: August 9, 1984

Respectfully submitted,

/s/ Carl D. Liggio

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ARTHUR YOUNG & COMPANY

Preliminary Statement

Arthur Young & Company ("Arthur Young") submits this brief as *amicus curiae* and urges that this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983).

This case materially affects the ability of over 2000 multiemployer pension plans with more than 8,000,000 plan participants and over $50 *billion* in assets to comply with Congressionally mandated audit (and actuarial) requirements. The case also

impacts multiemployer welfare plans. In fact, if the decision of the Sixth Circuit is allowed to stand, the salutary purposes of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 1208, could be substantially jeopardized.

INTEREST OF *AMICUS CURIAE*

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young is the independent auditor of Petitioners, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund") and Central States, Southeast and Southwest Areas Health and Welfare Fund ("Welfare Fund"), as well as numerous employee benefit plans, several of which are multiemployer plans such as Petitioners. These audits permit the plan trustees to comply with ERISA, 29 U.S.C. §§ 1001-1461 (1976 & Supp. V 1981), and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 (1982) *et seq.*

Most employee benefit plans are required to file an annual report, which includes the plan's financial statements, with the Internal Revenue Service which furnishes a copy to the Secretary of Labor. With respect to those plans with over 100 participants, ERISA requires an independent auditor to conduct "an examination of any financial statements of the plan" in accordance with Generally Accepted Auditing Standards ("GAAS"), 29 U.S.C. § 1023(a)(3)(A), so that the annual reports of those plans will include an independent accountant's opinion on whether the plan's financial statements and certain required schedules are presented fairly in accordance with Generally Accepted Accounting Principles ("GAAP"). *Id.* The ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants, such as

Arthur Young, to conduct audits of multiemployer benefit plans in accordance with GAAS.

Thus *amicus curiae*, Arthur Young, is vitally interested in having this Court resolve the question presented by this case:

> **May an employer, which participates in a multiemployer benefit plan, refuse to make available its employee records, including records of its purportedly non-covered employees, which it is required by statute to keep to determine employee benefit plan eligibility, to the auditors of that multiemployer benefit plan?**

THE PROCEEDING BELOW

In fulfilling the Trustee's statutory obligations, the joint internal audit staff of Petitioners, Central States Pension and Welfare Funds, both of which are multiemployer benefit plans, sought to examine the employment records of Respondents, who are contributing employers, to ascertain whether Respondents had employees who were covered by the plans and for whom funding contributions had not been made by their employers (the Respondents). After finding inconsistencies in employee reported data and ascertaining that there were upward adjustments in the accounts due from the employers (Respondents) of at least $268,000, the auditors sought to make further inquiries. When the employers (Respondents) refused access to their records and ejected the Central States internal auditors, the Central States Pension and Welfare Funds obtained an injunction directing Respondents to make the necessary records available. 522 F. Supp. 658 (E.D. Mich. 1981). On appeal, the Sixth Circuit reversed, holding that Petitioners had no right to review such records. 698 F.2d 802, 806.

SUMMARY OF ARGUMENT

In denying access to the records of purportedly noncovered employees, the Sixth Circuit committed several critical errors:

(1) it narrowly viewed the trustees' responsibilities and ignored the statutory requirement that the trustees obtain an annual independent audit in accordance with GAAS and an opinion as to whether the plan's financial statements were prepared in conformity with GAAP consistently applied;

(2) it concluded that although certain limited rights of inspection might be available to the funds, as a matter of law no "audit" of an employer's complete employee records to ascertain plan participants by the funds was authorized, 698 F.2d at 806, *but failed to recognize* that access to such records is inherently related to the required independent audit of the plan; and

(3) it concluded as a matter of law that an "audit" of an employer's complete employee records was "arbitrary and capricious,"[1] *even though* the court conceded that under the plan trust agreements there was a "reasonable cause" standard supported by the "prudent man" standard of ERISA, 29 U.S.C. § 1104(a)(1)(B), which allows a right of investigation, 698 F.2d at 810-811.

Upon analysis, these holdings are internally inconsistent as well as inconsistent with ERISA. Contrary to the holding of the Sixth Circuit, ERISA implicity authorizes access to *all* employee records of employers who participate in multiemployer benefit plans so that the plan trustees can meet the statutory reporting requirements and fiduciary obligations imposed by ERISA. By denying even limited access to an employer's employee records to

1. In so finding the Court also found that such audits were a waste of assets. 698 F.2d at 811. This finding was made by the Sixth Circuit without any factual basis. In fact, the finding runs counter to established precedent and what is in fact the case. *See, infra,* n. 7.

determine whether employees are improperly excluded and contributions omitted, the decision of the court of appeals effectively precludes the trustees from fulfilling their statutory obligations and makes an independent audit of the plan difficult, if not impossible. The decision of the court of appeals negates the substantial deterrent effect of the possibility of an audit, and jeopardizes the solvency of employee benefit plans by increasing the possibility of under-funding. The decision also adversely impacts the accurate calculation of fund termination payments upon withdrawal of an employer from the plan.

The Sixth Circuit decision in *Central States* has already resulted in troubling and unwarranted consequences. For example, the Seventh Circuit has interpreted the decision in *Central States* as limiting a plan trustee's ability to determine plan coverage. *Wolfe v. J.C. Penny Co.,Inc.*, 710 F.2d 388, 393 (7th Cir. 1983). Allowing the decision of the Sixth Circuit to stand will no doubt lead to further erosion of the ability to protect pension benefit plans and continued undermining of Congressional intentions in enacting ERISA.

ARGUMENT

I.

BACKGROUND-MULTIEMPLOYER PLANS

Multiemployer benefit plans are generally industry wide employee benefit plans covering all or some of a participating company's employees, 29 U.S.C. § 1002 (37). These plans provide a variety of retirement, health, and welfare benefits. They are usually jointly administered by management and labor under a collective bargaining agreement.

Covering employees of more than one company, multiemployer plans can include hundreds or even thousands of employers from all over the country, or only a few employers in one area. Plan participants may include both union and non-union employees. Over 8,000,000 employees in construction, mining, shipping, trucking, food retailing, textiles, and other industries currently

participate in over 2000 multiemployer plans[2] covering approximately 25 percent of all U.S. workers protected by defined benefit pension plans in the private sector. NATIONAL JOURNAL, June 26, 1982 at 12. A 1980 Department of Labor study estimated that more than 16 million workers will be covered by multiemployer pension plans by the year 2000. 1979-1981 PENS. PLAN GUIDE ANNOT. (CCH) ¶ 22,877 (Oct. 15, 1980).

Virtually all plans require contributions solely from employers. *Id.* For these plans funding is dependent solely upon employer contributions; and plan eligibility is determined "solely on the basis of service performed for a participating employer, regardless [of] whether that employer . . . has made or defaulted on his required contributions." Advisory Opinion, 31 August 1976, PENS. REP. (BNA), No. 221, Jan. 8, 1979; *Van Gunten v. Central States*, 672 F.2d 586, 589 (5th Cir. 1982). Accordingly, even if an employer fails to report the employee as a participant and does not make the required contributions, the multiemployer plan is nonetheless obligated to pay benefits to the employee when demanded. *See* 29 U.S.C. §§ 1052, 1053; 29 C.F.R. § 2530.200b-2(a)(1)(2). Thus, failure to make contributions for all employees covered by the plan leaves the plan under-funded.

This Court has only recently reaffirmed that among the purposes of ERISA was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of inadequately funded pension plans. *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Company*, 52 U.S.L.W. 4810, 4811 (U.S. April 16, 1984). Congress wanted to guarantee that "if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980).

Although multiemployer plans were subject to ERISA, it was the Multiemployer Pension Plan Amendments Act of 1980

2. As of 1982 multiemployer plans controlled over $50 billion in assets. Lublin, *Law to Protect Multi-Employer Pensions Is Causing Hardship for Many Businesses*, Wall St. J. Mar. 5, 1982 at 40, col. 1.

(MEPPAA) which directly addressed the growing concern over inadequate funding of multiemployer plans. The Pension Benefit Guaranty Corporation (PBGC), which must provide benefits to participants in those plans which terminate with insufficient assets to support their guaranteed benefits found, that:

> 12 percent of all multiemployer pension plans, covering one-fifth of all multiemployer pension plan participants, are experiencing extreme or significant financial hardship which may result in plan termination. . . . Two percent of all multiemployer plans, with a total unfunded, vested liability of more than $350 million, were found to be experiencing extreme financial hardship and to have a high potential for termination. The remaining 10 percent were deemed to have a significant potential for termination, with a total unfunded vested liability of $3.5 billion.

S. REP. No. 570, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4128, 4129 (footnote omitted). Inadequate funding caused by, *inter alia*, under-reporting and declining work forces in certain industries could lead to billions of dollars in unfunded liabilities, far more than the resources available to the PBGC to cover any failures. PENSION BENEFIT GUARANTY CORPORATION, *Multiemployer Study Required by P.L. 95-214* (1978), Appendix I, Potential Multiemployer Plan Liabilities Under Title IV of ERISA.

II.

CONGRESS DIRECTED THAT MULTIEMPLOYER BENEFIT PLANS HAVE ANNUAL INDEPENDENT AUDITS OF PLAN FINANCIAL STATEMENTS IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS

A. The Audit Requirement

Congressional concern with employee benefit funds dates back to the enactment of the 1947 Labor Management Relations Act. H.R. REP. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1135, 1173, when Congress sought to

protect certain employee benefit funds by requiring that the funds be subject to an annual audit. 29 U.S.C. § 186(c)(5).

The legislative history reveals that the annual audit requirement was intended to put safeguards on the improper and unsuccessful administration of employee benefit funds. Accordingly, Congress decreed that company contributions to employee benefit funds would not constitute an unfair labor practice if such funds were "guarded by certain restrictions, such as that it should be . . . subject to joint control by employer and employees *and by an annual audit* to insure its protection as a trust fund." 93 CONG. REC. 3565 (1947). (Emphasis added).

In 1974 ERISA supplemented existing reporting and disclosure requirements with provisions requiring the reporting of more detailed information concerning the administration of plan assets and the payments of benefits. Moreover, it continued and strengthened the independent audit requirement, 29 U.S.C. § 1023(a)(3)(A), by adding to the arsenal of weapons to protect employee benefit plans already available to the Secretary of Labor the right to hire independent auditors to audit such plans, 29 U.S.C. § 1024(a)(5).

In enacting ERISA Congress was also concerned over the adequacy of information available on employee benefit plans. The House Report, evidencing this concern, noted that:

> . . . experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan -- what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time, the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and

> that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

H. R. REP. NO. 533, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4649.

The Senate Report similarly concluded that an opinion of an independent auditor based upon the results of an annual audit would "allow better assessment of the plan's financial soundness by administrators and participants alike." S. REP. NO. 127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4864. The Conference Report, recognizing the importance of the audit requirement, specifically noted that *"the accountant is to give an opinion as to whether the financial statements of the plan conform with generally accepted accounting principles and the statement is to be based upon an examination in accordance with generally accepted auditing standards."* H. CONF. REP. 1280, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5040. (Emphasis added).

B. What an Audit of a Multiemployer Benefit Plan in Accordance With GAAS Entails

1. *Auditing employer records*

When Congress enacted ERISA and mandated that employee benefit plans be subject to an examination in accordance with GAAS, a body of professional literature and practice existed outlining the procedural steps required for audits in general and audits of employee benefit plans in particular. For example, in 1972, the American Institute of Certified Public Accountants published an Industry Audit Guide, AICPA, AUDITS OF EMPLOYEE HEALTH AND WELFARE BENEFIT FUNDS, ("1972 INDUSTRY AUDIT GUIDE") which, although not directly controlling audits of pension plans, summarized audit requirements

that had general applicability to pension plans and specific applicability to employee health and welfare funds such as the Petitioner, Central States Welfare Fund. The Guide noted that in addition to its specific requirements:

> Generally accepted auditing standards apply to audits of an employee health and welfare benefit fund to the same extent they apply to the audits of a commercial enterprise.

1972 INDUSTRY AUDIT GUIDE at 18.

The 1972 INDUSTRY AUDIT GUIDE reviewed the critical areas of employee health and welfare benefit fund audits. One such area was the audit of employer contributions -- the basic funding vehicle for any benefit plan:

> Contributions
>
> The basic objective in auditing contributions is to determine that amounts due the fund have been received and properly recorded and that employer records and participant records (eligibility or vacation contribution) are being properly maintained.
>
> * * *
>
> The auditing procedures employed should normally include, but are not necessarily limited to, the following:
>
> (1) Total cash receipts shown by the cash receipts book for a selected period should be reconciled to the total amount credited to the general ledger contribution accounts, to the total amount posted to the employer's record, and to deposits shown by the bank statements.
>
> (2) Selected individual employer contribution payments as shown by the cash receipts book should be compared to the amount shown on the employer's contribution report and to the amount posted to the individual employer's contribution record. Selected postings to the employer's record during the test period should be traced to the cash receipts book and to the employer's contribution report.

Id. at 19.

These procedures were initially directed at an audit of the plan's own records. However, when the auditor deemed it necessary and a direct review of an employer's complete employee records was undertaken, these same procedures were applied. Such procedures would include:

> Payroll Audits
>
> There may be circumstances in which the independent auditor is engaged to conduct audits of employers' payroll records to determine the propriety of the contributions made. The following paragraphs outline certain procedures which should be considered in the audits of employers selected:
>
> (1) The collective bargaining agreement should be reviewed to determine that the employer has complied with the applicable provisions.
>
> (2) The total gross earnings shown by the employees' earnings records should be reconciled with total wages shown by the general ledger and the payroll tax reports.
>
> (3) Information shown on the employer's contribution reports for a selected number of participants should be compared with the data shown on the employees' earnings records. In addition, a selected group of participants' earnings records should be compared with the employer's contribution reports to ascertain that they have been properly included or excluded from the reports.
>
> (4) The employer's general cash disbursements book should be reviewed to ascertain whether any payments not recorded as compensation have been made to employees.
>
> (5) For a selected period of time and for a selected group of employees, the data shown in the payroll journal should be compared to the employee earnings records and time records, and the related payroll checks should be examined.
>
> All exceptions to the foregoing tests should be cleared to the independent auditor's satisfaction.

Id. at 20-21.

In order to verify participants' data, and gain assurance that participant records and related pension plan liabilities are neither understated nor overstated, the auditor must be able to test the entire universe of an employer's employees, including non-participants.[3] As the pre-ERISA auditing literature and practice clearly indicated, verification of participation data is an integral part of a benefit plan audit in accordance with GAAS.[4]

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3. The audit literature applicable to all audits provides substantial guidance as to the problem raised by the possible failure to include all participants:

> When planning a particular sample [for a substantive test], the auditor should consider the specific audit objective to be achieved and should determine that the audit procedure, or combination of procedures, to be applied will achieve that objective. The auditor should determine that the population from which he draws the sample is appropriate for the specific audit objective. *For example, an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.*

AICPA, STATEMENT ON AUDITING STANDARDS ("SAS") No. 39, AICPA Professional Standards Volume A, U.S. Auditing Standards as of June 1, 1984 ("AICPA PROFESSIONAL STANDARDS"), AU350.17. (Emphasis added.)

4. In recognition of applicable professional standards, Arthur Young's own internal ERISA audit manual provided:

> The objective of the verification, when necessary, is to ascertain whether the data is complete, primarily that all eligible participants are included and that all relevant data has been provided, and accurate. (Eligible participants include present employees who meet the participation requirements of the plan, terminated employees who have vested benefits, and retired employees or their surviving spouses or other dependents receiving benefits.) Verification procedures usually include:
>
> - Determining benefit eligibility requirements and the statistical data about eligible participants necessary for the actuary to make his computations.
> - Testing the completeness and accuracy of the list of eligible employee participants by applying the eligibility requirements to employment records, both for employees on the list and not on the list.
> - Testing the accuracy of the statistical data about other eligible participants by reference to employment and payroll records.

The 1972 INDUSTRY AUDIT GUIDE further prescribed that a "disclaimer" of opinion on the financial statements of a multiemployer benefit plan would be appropriate when the auditor could not gain assurance as to "the propriety of employer contributions." *Id.* at 29. Such a "disclaimer" of opinion results from an inability to apply all of the procedures required by GAAS -- such as the ability to test the universe of employees. AICPA, SAS No. 2, AICPA PROFESSIONAL STANDARDS, AU509.12 and AU509.45.

In 1983, the AICPA issued a new Audit and Accounting Guide, covering all employee benefit plans, which codified existing literature and prior practice: AICPA, AUDITS OF EMPLOYEE BENEFIT PLANS (1983) ("1983 INDUSTRY AUDIT GUIDE"). This 1983 INDUSTRY AUDIT GUIDE, which was first issued as an exposure draft in 1980, expressly recognizes, as had the 1972 INDUSTRY AUDIT GUIDE, that "in examining the financial statements of a multiemployer plan, the auditor may need to make special arrangements to examine employer records," *id.* at 56; and concludes, as did the earlier Guide, that "[i]f the auditor is unable to obtain the necessary assurance regarding participants' data, he ordinarily should conclude that it will be necessary to express a qualified opinion or disclaim an opinion because of the limited scope of the examination." *Id.* at 63.

In imposing a GAAS audit requirement, Congress did so in the face of an established body of procedures which contemplated access to and, when needed, an audit of employer records to test plan participation data such as plan membership and contributions. Without access to and, when necessary, the ability to audit employer records, the GAAS audit requirement imposed by Congress cannot be met.

2. *The use of internal auditors to satisfy GAAS*

In conducting an independent audit, not every record of the entity under audit is examined. The independent auditor studies

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- Testing the accuracy of the employment and payroll records from which the data is obtained.

ARTHUR YOUNG ERISA AUDIT MANUAL § 8.105.

and evaluates a client's internal accounting controls to determine which records will be tested and the degree of reliance which can be placed on those records and internal accounting controls. AICPA, SAS No. 1, AICPA PROFESSIONAL STANDARDS, AU320. One aspect of internal accounting control which has a bearing on the extent of the independent auditor's procedures is the presence of an effective internal audit function. AICPA, SAS No. 9, AICPA PROFESSIONAL STANDARDS, AU322. The independent auditor evaluates how the internal audit function relates to the system of internal accounting controls and then considers the extent to which the internal audit staff may perform parts of the audit under the independent auditor's supervision. *Id.*

For example, in the audits of the Central States Pension Fund and Welfare Funds, Arthur Young not only independently tests plan participation data by, *inter alia*, directly testing employer records, but also uses the work of the internal auditors in this area. 1972 INDUSTRY AUDIT GUIDE at 15; 1983 INDUSTRY AUDIT GUIDE at 62. Based on Arthur Young's review of fund records, it may request the internal audit group to examine certain employer's records or do so itself. Arthur Young also reviews the work performed by the internal auditors with respect to the audits of employer records. Accordingly, the work of the internal audit function, which is at issue here, is an integral part of Arthur Young's independent audit required by statute. 29 U.S.C. § 1023(a). Absent the work of the internal auditors, Arthur Young would have to materially increase its own procedures[5] at increased cost to the plan or render a "qualified" or "disclaimed" opinion based on a "scope" limitation in the audit caused by the failure to have access to all records necessary to render its opinion on the plan's financial statements.

5. One employer has already refused Arthur Young access as a result of the Sixth Circuit's decision. In addition, Arthur Young's audit work papers show that there were 16 instances of employer "turn downs" to access by the internal auditors of employer records during the period June 13, 1983 to March 31, 1984.

C. The Impact of a Qualified Auditor's Opinion

ERISA requires a GAAS audit to enable the independent auditor to opine as to whether the financial statements fairly represent the financial position of the plan in conformity with generally accepted accounting principles consistently applied. 29 U.S.C. § 1023(a)(3)(A). The Department of Labor has authorized independent auditors to have "scope" limitations in the audit in a very limited category of situations not applicable here. 29 C.F.R. § 2520.103-8. A "qualified" or "disclaimed" opinion resulting from a "scope" limitation relating to the inability to test plan participation data indicates a non-GAAS audit and does not comply with the statutory requirements of the Labor Management Relations Act of 1947 or ERISA. Arthur Young has been orally informed by the Department of Labor that in all likelihood the submission of an opinion containing such a "scope" limitation will be treated as a failure by a plan to comply with the Annual Report filing requirements. *Cf.* 29 C.F.R. § 2520.103-1(b)(5)(iv) and § 2520.103-2(b)(5)(iv).

III.

CONGRESS INTENDED PLANS TO HAVE ACCESS TO ALL EMPLOYER RECORDS

A. Access to all Employer Data was Contemplated by Congress in Order to Satisfy the Audit Requirement

One objective of financial statements of employee benefit plans is to permit the assessment of the adequacy of a plan's present and future ability to pay benefits to covered employees. FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 35 at ¶2 (1980). The Sixth Circuit decision, restricting the scope of an audit only to employer records of concededly covered employees, defeats this objective.

Since multiemployer plans are liable for benefits to eligible employees regardless of whether a particular employer has made

contributions on the employees' behalf, *see* 29 U.S.C. §§ 1052, 1053, Department of Labor Advisory Opinion No. 76-89, 31 August 1976, PENS. REP. (BNA), NO. 221. JAN 8, 1979); *Van Gunten v. Central States, supra*, it is essential in determining the plan's financial integrity to ascertain whether any plan participants have been omitted and whether all required contributions have been made. If access to the "entire universe" (*i.e.*, both admittedly covered and allegedly non-covered employees) of plan participants is denied, no one will be able to assess whether the plan financial statements reflect all benefits for which the plan will ultimately be responsible and, more importantly, all contributions required to fund those benefits.

It is in this context that Congress required employers to maintain records for all employees,[6] not just plan participants, 29 U.S.C. § 1059(a), and imposed penalties on employers who failed to keep such records. 29 U.S.C. § 1059(b). Moreover, Congress imposed reporting obligations on employers based on these record keeping requirements. 29 U.S.C. § 1059(a).

A court imposed "scope" limitation on access to all employer records is likely to create an insurmountable audit problem to discovery of instances of under-reporting and non-reporting of employees who are in fact covered by and entitled to plan benefits. To deny access to those records inhibits crucial auditing procedures, violates established standards of auditing practice, and essentially renders the reporting, disclosure, and auditing requirements of ERISA and the Labor Management Relations Act ineffective.

When Congress enacted the audit requirements of ERISA and established the foregoing employer record keeping and reporting requirements for *all* employees, existing audit practices included the testing of employer records to determine whether there were unreported employees who were nevertheless entitled to benefits and thus payments due the plan to cover those employee benefits.

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6. The definition of employee as set forth in ERISA, 29 U.S.C. § 1002 (6) includes any individual employed by an employer. Thus, ERISA fails to make a distinction between "covered" and "non-covered" employees.

Supra at 9-13.[7] As the record keeping requirement complements the audit requirement by assuring the availability of information to make the necessary evaluations, the two provisions should be read together. For Congress to have denied access to the very records which it has required employers to keep to determine both plan eligibility and the amount of employer contributions as the court of appeals held, while at the same time to have required an audit, which by definition includes an examination, *inter alia*, of records to determine the universe of plan participants, creates an internal inconsistency in the statute, which Congress could not have intended.

Application of the basic rules of statutory construction further supports the view that the Sixth Circuit decision is contrary to Congressional intent and inconsistent with the applicable statute. It is an established tenet of statutory construction that acts of Congress relating to the same subject matter are to be read *in pari materia*. *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412

7. It is a given that audits of payroll records can result in substantial recoveries of monies which are due to multiemployer plans, but have not been paid because neither proper information nor employee coverage has been reported to the multiemployer plan. *See, e.g., Jim McNeff, Inc.* v. *Todd*, 103 S. Ct. 1753 (1983) (audit revealed that employer owed more than $5,000 on behalf of five employees that employer had never reported as covered); *Laborers Health & Welfare Trust Fund* v. *Kaufman & Broad of Northern California, Inc.*, 707 F.2d 412 (9th Cir. 1983) (audit indicated a discrepancy exceeding $130,000 due to controversy regarding covered or uncovered status of particular nonunion labor); *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), *reh'g denied*, 711 F.2d 713 (1983), *cert. denied*, 52 U.S.L.W. 3844 (U.S. May 21, 1984) (audit uncovered more than $100,000 due on behalf of covered employees who employer erroneously believed were not covered); *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981) (deficiency of more than $25,000 revealed due to failure to contribute on behalf of nonunion covered employees). *I.A.M. National Pension Fund* v. *Industrial Gear Manufacturing Company*, 723 F.2d 944 (D.C. Cir. 1983) (audit revealed that employer had failed to make payments in excess of $90,000). Based on information obtained from Central States during the audit process, Arthur Young's audit records show that as a result of these audits by the Central States internal audit function, substantial adjustments and recoveries from employers have been made. For example, in the 12 months since July 1983, there were 50 internal audits of employers at an estimated cost to Central States of $770,000. These audits produced assessments totaling $5,540,000 or a potential 7 to 1 return.

U.S. 609, 631-32 (1973) [separate provisions of a single act should be interpreted to give the Act "the most harmonious, comprehensive meaning possible" in light of the legislative policy and purpose]. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, § 51.03 (4th ed. 1973). This harmony can only be achieved here if 29 U.S.C. § 1059 is read as a grant of authority to enable a plan to fulfill its statutory audit requirement by obtaining access to all employee records.

Finally, although the Sixth Circuit recognized that there is a "reasonable cause" standard which allows access to employer records, 698 F.2d at 810, it felt it was arbitrary and capricious to "audit" *all* employee records of the employer, *id.* at 811, notwithstanding the fact that the internal auditors had found errors and omissions in the data reported by the employers (Respondents). This holding failed to consider the statutory requirement imposed upon the plan's trustees to obtain an independent audit of the plan and a "clean" or "unqualified" opinion on the plan's financial statements free from any "scope" limitation resulting from limited access to employer records. Since the failure to obtain access to the employer records could result in a non-GAAS audit and a "qualified" or "disclaimed" opinion on the plan's financial statements, it follows that the Sixth Circuit's holding that a request for inspection of "non-covered" employee records is "arbitrary and capricious" is, *a fortiori*, incorrect. In fact, failure to seek access to the records may be a failure by the trustees to maintain adequate internal controls which, *inter alia*, could result in a scope limitation in the audit and could well violate the "prudent man" standard found in ERISA, 29 U.S.C. § 1104(a)(1)(B); and such failure might mandate that the independent auditor obtain access to those employer records.

Moreover, the holding fails to consider both the monetary benefit such audits result in (*supra*, n. 7) and the substantial deterrent effect they have.

B. Access to all Employer Data was Contemplated by Congress in Order to Ascertain Funding Requirements

Another Congressional concern was the possible draining of fund assets in the future by persons unidentified in the plan records and for whom employer contributions were not made. At the time such under-reporting becomes known, the employer responsible may be neither in business nor a participating employer. The employer who created the under-funding then escapes the liability and the burden is imposed on other employers who have already paid their fair share.

1. *Lack of access to employer data precludes adequate funding determinations required by Congress*

The passage of MEPPAA in 1980 significantly changed an employer's funding responsibilities in a multiemployer plan. An employer's obligation to fund benefits is no longer limited to its negotiated contribution plus a modest contingent liability upon withdrawal. Thus in order to minimize the impact of under-funding, MEPPAA provided that, to the extent multiemployer pension plans were under-funded, all employers in the plan could be assessed to cure the under-funding. 29 U.S.C. § 1421 *et. seq.*

The withdrawal liability provisions of the MEPPAA are a central part of the solution adopted by Congress to protect the benefits of participants in multiemployer pension plans. *Washington Star Company* v. *International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1505 (D.C. Cir. 1984). Upon complete or partial withdrawal from an on-going multiemployer plan, the withdrawing employer incurs an immediate liability for a share of the plan's unfunded vested benefits, 29 U.S.C. § 1381 *et. seq.*, *not just* the under-funding caused by the withdrawing employer. MEPPAA describes a variety of methods by which a plan may calculate the amount owed by a withdrawing employer. 29 U.S.C. § 1391. In three out of the four methods described, amounts are reallocated from other employers who, by terminating their plans without fully funding their liability because of under-reporting or otherwise, have escaped liability. *Id.*

Similarly, if a plan does not meet the funding standards required by the Act, a plan may be placed in reorganization and an employer's contribution may be increased to prevent the plan from terminating. 29 U.S.C. § 1423(b). If a plan terminates, participating employers may be required to continue to contribute in order to fund the plan's unfunded vested benefits of the terminated plan.

Thus, the burden for such latent benefits due to under-reporting falls on all employers[8] through increased future contributions to the plan and, probably, increased insurance premiums to the PBGC. To the extent the latent benefits were caused by previously withdrawn employers, participating employers and those subject to plan termination charges become liable for benefits earned by workers who were never in their employ.

Unless the total universe of plan participants is identified, the actuarial computations to determine plan funding, 29 U.S.C. §§ 1023(d) and 1393, and withdrawal liabilities, 29 U.S.C. § 1391, are suspect, and both an employer's current funding obligations and withdrawal liabilities cannot be accurately determined, if they can be determined at all. Accordingly, access to all employee data to ascertain that all plan participants are reasonably accounted for and required contributions made is essential to the proper administration of multiemployer plans. Thus, the passage of MEPPAA makes the need for comprehensive audits to permit reliable assessment of funding liability all the more critical.

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8. As this court recognized in *Schneider Moving & Storage Company* v. *Robbins*, 104 S. Ct. 1844, 1850 (1984), the failure of an employer which participates in a multiemployer plan to properly fund its share of the liabilities adversely affects other employers, thus:

> "Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective-bargaining agreement would have an adverse effect on the other participants."

2. *The PBGC is adversely affected*

In order to insure that payments will be made to all employees entitled to benefits, Congress created an insurance funding mechanism through the PBGC. Employers in multiemployer plans are assessed an "insurance premium" to cover both actual and estimated shortfalls in benefit payments because of under-funded plans. 29 U.S.C. §§ 1301 *et seq*. The PBGC constantly reviews both the financial statements and actuarial reports of pension plans to assess the adequacy of funding. Failure to have reliable information on which to make these critical assessments would impair the ability of the PBGC to effectively fulfill its statutory mandate.

CONCLUSION

If there is a failure to report only one half of one percent (.5%) of the employees eligible to participate in all multiemployer plans, contributions to multiemployer pension plans will be under-funded at an *initial* rate of over $100,000,000 *per year*.[9] Congress clearly did not intend such a result; in fact, the legislative history shows Congress intended the audit and actuarial functions to be an important line of defense against such potential under-funding. The decision of the Sixth Circuit is inconsistent with clearly defined obligations imposed upon both the trustees and independent auditors by Congress. The decision substantially undermines the ability to assess the adequacy of funding of all multiemployer benefit plans and could lead to substantial instances of under-reporting of covered employees either through inadvertence or

9. In 1978 it was estimated that there were over 8,000,000 employees participating in multiemployer plans. This number is expected to grow to 16,000,000 participants by the year 2000. Assuming the average employer contribution is $50 a week per "covered" employee as it is in the National Master Freight Agreement at issue here, there is an annual under-funding of contributions in excess of $100,000,000 a year (40,000 omitted participants X $2600). When the lost compounded earnings that would have been generated by these contributions is taken into account, the amount of the under-funding becomes staggering. Using a compounded rate of 10%, within 4½ years multiemployer plans would be under-funded by almost ½ *billion* dollars if funding were not provided for over .5% of the covered employees.

design. Thus the deterrent effect of the audit process would be substantially weakened. Finally, the ability to calculate employer plan withdrawal liabilities is adversely impacted.

WHEREFORE, *amicus curiae* Arthur Young respectfully requests that this Court reverse the decision of the Sixth Circuit Court of Appeals.

Dated: August 9, 1984

Respectfully submitted,

/s/ Carl D. Liggio

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APPENDIX

§ 1002. Definitions

For purposes of this subchapter:

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

§ 1023. Annual Reports

(a)(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies.

* * *

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include --

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to

form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 1024 (b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply.

* * *

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

* * *

(4)(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) An annual report under this section shall include a financial statement containing the following information:

* * *

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of

revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

* * *

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

* * *

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

Actuarial statement

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section

for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report if filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination priority categories as set forth in section 1344 of this title, and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary --

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

§ 1024. Filing and furnishing of information

(a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary --

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing)

* * *

(5) If the Secretary rejects filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not

submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions --

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

§ 1030. Alternative methods of compliance

(a) The Secretary on his own motion or after having received the petition of an administrator may prescribe an alternative method for satisfying any requirement of this part with respect to any pension plan, or class of pension plans, subject to such requirement if he determines --

(1) that the use of such alternative method is consistent with the purposes of this subchapter and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary,

(2) that the application of such requirement of this part would --

(A) increase the costs to the plan, or

(B) impose unreasonable administrative burdens with respect to the operation of the plan, having regard to the particular characteristics of the plan or the type of plan involved; and

(3) that the application of this part would be adverse to the interests of plan participants in the aggregate.

(b) An alternative method may be prescribed under subsection (a) of this section by regulation or otherwise. If an alternative method is prescribed other than by regulation, the Secretary shall provide notice and an opportunity for interested persons to present their views, and shall publish in the Federal Register the provisions of such alternative method.

§ 1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.

The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who --

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 1053(b)(3)(A) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be

required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section --

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted --

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a partial withdrawal described in section 1385 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall --

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.